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THE LAW OF THE PUBLIC CALLINGS AS A SOLUTION OF THE TRUST PROBLEM. II.

IV.

IT may be objected that in the case of most of the public service companies which have been brought forward for examination thus far in this discussion, a characteristic fact has been that the corporation in question has enjoyed some privilege or other from the state. It is quite true that eminent domain, or at least use of the streets, may be found in many of the examples cited; while aid out of taxation and even actual operation by the state, may be fastened upon in certain instances. The question thus arises whether, after all, the public employments extend further than the public privileges; whether virtual monopoly can give rise to a public calling, if the state has had no hand in the establishment of the situation.

The question is pertinent. An examination of the limitations under which these various privileges are granted under our constitutional system ought to give the answer. Under that system these extraordinary powers of government can only be exercised for public purposes, otherwise there will result a taking of private property for private use, which cannot with us be due process of law. Upon this principle, it is submitted that in the usual case the right of eminent domain cannot be granted to any business corporation unless it be a public service company, otherwise

there will not be that public purpose which is necessary to justify the taking. In the same way state aid cannot be extended to a commercial enterprise unless it be a public calling, for there will not be the public purpose necessary in taxation. It is true that the laws governing these matters show minor variations upon these points, but it is asserted with confidence that these considerations are at the basis of these rules.

The proof of this contention may be found in explanatory statements by various judges in such cases, making clear the grounds upon which they decide whether the grant of these special privileges is justifiable or not. Township of Burlington *v.* Beasley[1] is one such case. The issue was whether a series of bonds was valid under the state constitution. These bonds had been issued to aid the construction and completion of a steam custom grist mill within the township. The law empowered the execution of bonds for the purpose of building bridges, free or otherwise, or to aid in the construction of railroads or water power by donation thereto or taking stock therein, or for other works of public improvement.

Mr. Justice Hunt in delivering the opinion of the court said in part: "The mill was a steam mill. Does such an establishment fall within the description of 'other works of internal improvement'? It would require great nicety of reasoning to give a definition of the expression internal improvement which would show that the means of transportation were more valuable to the people of Kansas than the means of obtaining bread. It would be a poor consolation to the people of this town to give them the power of going in or out of the town upon a railroad, while they were refused the means of grinding their wheat. The Statute of Kansas upon the subject of grist mills is based upon the idea, and, indeed, upon the declaration, that all grist mills are public institutions. In c. 65 of the Statute of 1868, p. 573, it is thus enacted: 'All water, steam or other mills, whose owners or occupiers grind or offer to grind grain for toll or pay are hereby declared public mills.' Regulation is then made for the order in which customers shall be attended to, the liability of the miller, the rates of toll. Under our recent decision in Munn *v.* Illinois, and the other cases upon kindred subjects, it would be competent to the legislature of Kansas, to regulate the toll to be taken at these mills."

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[1] 94 U. S. 310.

It is plain that this is a close case when it comes down to final adjudication. It is true that it is indispensable that the people of Kansas should have the means of obtaining bread, but so is it necessary that they should have the means of getting meat. Purveying to a public need does not make a calling public, for most businesses do that to a degree. It must therefore be the conditions surrounding the vending that affect the employment with a public interest. Where there is virtual competition the state has no function to interfere; it is only where there is virtual monopoly that the state may regulate the service. Upon the whole that is the basis upon which this opinion is founded. It holds by way of argument that it would be competent for the legislature to regulate the toll to be taken by these mills; therefore it argues that the establishment of them is a public purpose, treating these matters as all one legal problem.[1]

A much more obvious public service is the irrigation system; so obvious indeed that the propriety of state aid to such an undertaking has never been doubted. In Cummings *v.* Hyatt,[2] it was contended that the act under which the parties proceeded and succeeded in procuring the authorization of the bonds in question was unconstitutional and void in that it sought to apply private property to a private use; that the taxation of property in the township to pay the principal and interest of the bonds would work a taking of the property of citizens without due process of law; and that the contemplated irrigating ditch was not a work for the benefit of the public in such a sense as to warrant treating it as an internal improvement.

But the answer of Chief Justice Harrison to that contention was unequivocal; he said in brief: "It must be concluded that it has been established by both legislative and judicial determination that the use, in contemplation of law and designated thereby, was a public one, and with the further considerations that all members of the public within the range of the operations of the work might demand and command service by the company by payment of the usual and customary rates for such service, and that the company was of such a nature as would subject it in its transactions to

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[1] In effect the following cases, among others, hold grist mills to be in public calling: Blair *v.* Cumming County, 111 U. S. 363; Boston Mill Corp. *v.* Newman, 12 Pick. 467; Trader *v.* Merrick County, 14 Neb. 327; Scudder *v.* Trenton Falls Co., 1 Saxt. Ch. 694.

[2] 54 Neb. 35.

legislative control, — it was not improperly classed as an internal improvement and entitled to the rights and privileges of such a work."

That the business of the irrigation company is public in its nature appears from every test. The supply of water available is limited by nature, the cost of the construction of the works is beyond individual enterprise; when the system is established the applicant will have no alternative, he has not even the opportunity to provide for himself. Since this is the situation the public interest requires that such works should be made practicable by eminent domain; and the situation may even be such that some subsidy from the state may be necessary to induce the promotion of the enterprise. There are two tests therefore: first, whether the purpose is public, a matter of law; second, whether state aid is necessary, a matter of judgment.[1]

The development of natural resources often is of such public interest in the sense that the term is here employed, as to require state regulation to prevent those in control from exploiting their natural monopoly. If at the outset the petroleum industry had been made the subject of special legislation, our recent industrial history might not have proved such interesting reading. Because of the peculiar conditions surrounding the transportation of oil by the extension of the pipe line systems, virtual monopoly in that business was the inevitable result. Those persons who had the upper hand in those regions therefore avoided bringing these issues to public notice by carrying out their plans without appeal to the state.

In West Virginia, however, the legislature at an early date authorized eminent domain, so that the courts were confronted with the necessity of deciding whether the construction of a pipe line was a public purpose. In West Virginia Co. *v.* Volcanic Co.,[2] Mr. Justice Moore said upon that point: "It has been decided time and time again, and is therefore settled by the best authority, that the construction of railroads, turnpikes, canals, ferries, telegraphs, wharves, basins, etc., constitutes what is gen-

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[1] In effect the following cases, among others, hold irrigation companies to be in public calling: Fallbrook District *v.* Braddley, 164 U. S. 112; Lux *v.* Haggin, 69 Cal. 255; Land Creek Co. *v.* Davis, 17 Col. 326; Slosser *v.* Salt River Co., 65 Pac. Rep. 332; Paxton Co. *v.* Farmers' Co., 45 Neb. 884; Umatilla Co. *v.* Barnhardt, 22 Ore. 389; Irrigation Co. *v.* Vivian, 74 Tex. 170.

[2] 5 W. Va. 382.

erally known by the name of internal improvements, and gives occasion for the exercise of the right of eminent domain. And other measures of general utility in which the public at large are interested, and which require the appropriation of private property, are within the power where they fall within the reasons underlying the cases mentioned. The charter granted to the West Virginia Transportation Company by special enactment of the legislature, shows that the object was to construct a line for the transportation of petroleum. The charter also established the maximum charges the company should make for transportation of oils. I cannot see the propriety of admitting a railroad or canal or aqueduct to be an internal improvement, and declare this tube highway not to be."[1]

It is not pretended that within the narrow compass of this article the whole of the constitutional law upon these subjects may be set forth with any accuracy of detail. What is contended is that this distinction between the public calling and the private calling is the key to the situation. Not unless the given business is by its nature affected with a public interest can the legislature give to it aid from the public treasury; not unless the work is to be of service to the public as a whole, will the courts sanction the exercise of eminent domain.

Public necessity, it is clear, must be proved in every case, but public service must be shown also; unless the managers of the enterprise undertake to serve all who apply upon reasonable conditions, the public have no interest in the promotion or conduct of the enterprise, its success or failure. An unusual decision in point is the case of Evergreen Cemetery Association *v.* Beecher,[2] which arose out of a complaint asking leave to take land for burial purposes by the right of eminent domain.

In sustaining a demurrer to the petition, Mr. Justice Pardee drew this distinction: "It is a matter of common knowledge that there are many cemeteries which are strictly private, in which the public have not, and cannot acquire the right to bury. Clearly the proprietors of these cannot take land for such continued private use by right of eminent domain. There is no allegation that the land which it desires to take for such enlargement is for the public

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[1] There is no reason to suppose, therefore, that the pipe line companies are not in public calling: West Va. Pipe Line Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 604. Compare the situation of the electrical subway companies, Bush Electric Co. *v.* Consolidated Subway Co., 15 N. Y. Supp. 81.

[2] 53 Conn. 551.

use in the sense indicated in this opinion. It is a public use only if all persons have the same measure of right for the same measure of money." [1]

All these considerations are most suggestive; indeed, one is led by them to an entire inversion of the common statement of the relation between the existence of public privileges and the establishment of public employment. It is common to argue that because a certain business has had a certain privilege granted to it, the consequence follows that the business is put by the courts in the class of public callings. But the real truth of the matter seems to be in the opposite statement, that no business can be granted a privilege under our constitutional system unless it is a public calling. This is because the conditions which permit competition or produce monopoly are altogether external matters of fact with which, when accomplished, the law must deal in one way or another. The difference between public calling and private calling is inherent in the nature of things.

V.

It is now possible to discuss the general problem without the confusion due to the complicating circumstance of state aid. That may be now put aside as unessential to the final determination. The case may be put of an actual monopoly where there is no legal privilege whatsoever. That case is Munn *v.* Illinois.[2] Any discussion of the foundations of our industrial relations must begin with that decision; since it is recognized that this case has within its view all public duties and all private rights which are established under our system of government. Upon the right understanding of this accommodation of private rights to public duties depends the true conception of our general theory of the function of state regulation.

The facts of the case are worth careful examination. The General Assembly of Illinois in 1871 had passed a statute which provided a maximum rate beyond which no person should be charged for the storage of grain in public elevators. The firm of Munn & Scott refused to obey the act, and accordingly were fined. They

[1] These cases, among others, hold in effect that the cemeteries are public service companies: Oakland Cemetery *v.* St. Paul, 36 Minn. 529; *Re* Deansville Cemetery Ass'n, 66 N. Y. 569; Henry *v.* Trustees, 48 Oh. St. 671; Cemetery Ass'n *v.* Redd, 33 W. Va. 262.

[2] 94 U. S. 113.

appealed the case from court to court until the Supreme Court of the United States was reached. The Supreme Court confirmed all the decisions which had been given below, and decided against the defendant. The points to be noted are these: the elevator of Munn & Scott stood upon land bought by them by private treaty; they had no privileges in the public streets; they had no aid from the public treasury; they were not even incorporated. Here, then, is a case that raises the question without complication.

As a general problem, Mr. Justice Waite discusses it: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago in his treatise *De Portibus Maris*,[1] and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

This, then, is our constitutional law. Yet the sweeping principles laid down in this case of Munn *v.* Illinois must be employed with the greatest caution; otherwise there is danger that all businesses may be dragged into the net. What businesses, then, are so affected with a public interest that they are made of such public consequence that the public has an interest in their control? Profession of a willingness to serve the public, it must be plain, is not the sole test; for that would include all the small shops as well as the great exclusive industries. Attempts to enforce public duties in respect to the operation of private businesses must always fail by virtue of the guaranties of our constitutions; for although it is true as an abstraction that absolute property rights

[1] 1 Harg. Law Tr. 78.

cannot exist in organized society, yet by comparison with the qualified rights in public employment the rights protected in private business seem complete. Munn *v.* Illinois therefore involves the distinction between the regulation permitted in public calling and the police allowed in private calling.[1]

The only qualification upon the full acceptance of Munn *v.* Illinois is a late case in the same court, Cotting *v.* Kansas City Stockyards Company.[2] In 1897 the state of Kansas passed a statute entitled, An Act defining what shall constitute Public Stockyards, defining the duties of persons operating the same, regulating all charges thereof, and providing penalties for violations of the act. It was proved that if the capital stock of the Kansas City Stockyards Company were taken after deducting therefrom the portion which represented property not used for stockyard purposes, the return which would be left to the stockholders upon their investment would be only 4.6 per cent, if the rates fixed by the statute were enforced. For this, among other reasons, the legislation was held unreasonable and so unconstitutional.

Mr. Justice Brewer in the opinion takes various distinctions. He begins by reciting the paragraph from Munn *v.* Illinois just quoted; he continues: "Tested by the rule laid down in Munn *v.* Illinois, it may be conceded that the state has the power to make reasonable regulation of the charges for services rendered by the stockyards company. Its stockyards are situated in one of the gateways of commerce, and so located that they furnish important facilities to all seeking transportation of cattle. While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore must be considered as subject to governmental regulation. But to what extent may this regulation go? Is there no limit beyond which the state may not interfere with the charges for services of those who while not engaged in such service have yet devoted their property to a use in which the public has an interest? And while in the present case by the decisions heretofore referred to they cannot claim immunity from all state

[1] The following decisions among many others are based upon Munn *v.* Illinois: Budd *v.* New York, 143 U. S. 547; Davis *v.* State, 68 Ala. 58; Leep *v.* Railroad, 58 Ark. 416; White *v.* Canal Co., 22 Colo. 198; Breechbill *v.* Randall, 102 Ind. 528; State *v.* Edwards, 86 Me. 305; Belcher *v.* Grain Elevator, 101 Mo. 192; State *v.* Gas Light Co., 34 Oh. St. 572; Baker *v.* State, 54 Wis. 368.

[2] 183 U. S. 79.

regulation, they may rightfully say that such regulation shall not operate to deprive them altogether of the ordinary privileges of others in mercantile business."

The admission in this case that such a situation is peculiarly affected with a public interest so that such regulation as the exigency requires is proper, is enough. Differences exist between different cases, and it may be granted that in the actual case a return of 4.6 per cent on the investment is too little. The extent to which a business is public is a matter of law to be determined by the courts upon the application of their own tried tests to the situation. Whether a business is public or not depends upon the situation of the general public with respect to it. Are there enough of such purveyors to serve the public? If so, there will be virtual competition; if not, there will be virtual monopoly. In these cases of the grain elevator and of the stockyard, experience shows that in a given community there are not usually competitive conditions; monopolistic conditions generally prevail. It is not by accidental coincidence that they prevail. They prevail by natural limitation. The facts are that in any given community the plots of ground upon which these businesses may be conducted with convenience and efficiency are few and concentrated. In the case of the Chicago elevator those are the lots which both border upon the river and are adjacent to the terminals; in the case of the Kansas City stockyard the only available lands lie within the network of the railroads entering the city. In this essential particular the cases are alike; and they should therefore be treated alike.[1]

Barrington *v.* Commercial Dock Company[2] bears out this contention. The appellant was the owner of a wharf situated upon navigable water in the city of Tacoma, not located, however, upon any highway. The respondents were owners of the steamer Cricket, a passenger steamer plying between the cities of Tacoma and Seattle. They instituted this action for the purpose of compelling the appellant to permit them to use its wharf as a landing-place. Vessels of a similar character in competing business with the steamer Cricket were permitted to use the dock. The only statute gave a right to erect wharves upon navigable waters and

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[1] *Cf.* Chicago R.R. *v.* Minnesota, 134 U. S. 467; Spring Valley Co. *v.* San Francisco, 82 Cal. 286; Pensacola R. R. *v.* Florida, 25 Fla. 310; Wellman *v.* Railway, 83 Mich. 592; Delaware R. R. *v.* Stockyard Co., 45 N. J. Eq. 50.

[2] 15 Wash. 170.

to charge wharfage. The appellant therefore contended that the wharf was its private wharf, and that it had therefore the right to determine for itself with whom it would do business.

Mr. Justice Gordon founded his argument upon these propositions: "When wharves belonging to individuals are legally thrown open to the use of the public, they become affected with a public interest. We think that in determining the character of the appellant's wharf, regard should be had to the use to which it has been devoted rather than its private ownership, and that upon the facts found the position of the appellant cannot be maintained. As well might the proprietor of a stagecoach claim the right to discriminate upon the ground that the property employed in his business was private property. The doctrine, if maintained, would tend to promote and further monopolies which it is not the policy of our law to favor." [1]

This commanding position is always a badge of public calling, because it gives the upper hand. The most extreme case of this sort is Nash *v.* Page.[2] That case was a controversy between the proprietors of ten of the tobacco warehouses in the city of Louisville, and the appellants, twenty-seven in number, who were dealers in tobacco. It appeared that the appellants had been denied the right to make purchases of tobacco at the warehouses of which the defendants were the proprietors. Accordingly, they had applied to the chancellor for an injunction asking that these warehousemen be enjoined from refusing them permission to make purchases at their several warehouses, and from rejecting their purchases when making the highest bids for the tobacco offered, upon the payment of such fees as were charged other buyers. The refusal was due to an attempt to restrict dealings to members of the Board of Trade.

The opinion of Mr. Justice Pryor is one of the most significant on this subject: "Since the formation of the state government, the sale of this great staple has been fostered and protected by legislation. Such warehouses have always been regulated by law, for the benefit of the producer as well as those who are proprietors of these warehouses, and the latter have assumed an obligation to

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[1] The following cases among others hold that such companies are in public calling: Robertson *v.* Guilder, 69 Ga. 340; District *v.* Johnson, 1 Mackey 51; Aiken *v.* Eager, 35 La. Ann. 567; Steamship Co. *v.* Elevator Co., 75 Minn. 312; Buffalo *v.* Railway, 39 N. Y. Supp. 4; Ryan *v.* Terminal Co., 102 Tenn. 119.

[2] 80 Ky. 539.

the public which exists as long as they continue public warehousemen. It is a conceded fact that more than five millions in value of tobacco annually finds its way from the producer to the warehouses in that city. The greater part of this product is grown within the state, and the producer has almost of necessity to place his tobacco under the control of, and for sale by, these several warehousemen at public auction. All this tobacco must necessarily pass through these warehouses, subject to such charges as are reasonable and proper. Such a public duty may be imposed on these warehousemen in express terms or by implication, but whether so imposed or not, it arises from the facts of the case. In this great tobacco center the producer is restricted to these public warehouses, or rather these public warehouses have a mutual monopoly of the sales of tobacco at auction, and the fact that there is more than one or a dozen such warehouses cannot affect the question."

All of these cases now under discussion are alike in this, that in all of them the conditions surrounding the industry, and these alone, are held enough to put the business within the law of public calling. That position of affairs may be summed up in a single phrase — virtual monopoly. A review of the instances which have been cited in the course of this discussion will show that this conception of virtual monopoly will cover everything. Nothing narrower will do, as for example the difference sometimes made between the undertaking of a public service and the furnishing of a public supply. Now, it is true that most of the cases are cases of service — the railway and the warehouse, for example; but others of the cases are of supply, — the waterworks and gas works, for instance. Indeed, there is nothing in this distinction, either in economics or in law. Virtual monopoly is therefore the exact description of the situation. It is submitted that any business is made out to be a public calling in which there is, from the nature of things, an inherent virtual monopoly.

VI.

Virtual monopoly must now be differentiated from virtual competition. It is submitted that upon this difference our constitutional law turns. If virtual monopoly is made out as the permanent condition of affairs in a given business, then the law, it seems, will consider that calling public in its nature; on the other hand, if virtual competition is proved as the regular course of things in a

given industry, the law will hold all businesses within it as private in their character. In the public calling, regulation of service, facilities, prices, and discriminations is possible to any extent. Such monopolistic conditions demand such police; in no period has this been more apparent than now. In the private callings, however, no such legislation should be permitted; in no epoch has it been more necessary to insist upon this. Competitive conditions should be left without such restrictions.

From the present discussion it must be evident that the industrial trust is near to this indistinct line which separates public employment from private business. In various lines of business at the present time there are at most a few corporations, often one corporation, which have substantial control of the market in that industry. Whether these monopolistic conditions are real or fictitious, natural or accidental, is the question. A most interesting case at this point is Inter-Ocean Publishing Company *v.* Associated Press.[1] The plaintiff newspaper had regularly taken the news of the defendant bureau. One of the by-laws of the Associated Press forbade members to buy news of any other agency; notwithstanding which the plaintiff took specials of the Sun Publishing Association. Thereupon the Associated Press enforced its by-law against the plaintiff, which is the basis of this action.

Mr. Justice Phillips held the by-law bad: "The organization of such a method of gathering information and news from so wide an extent of territory as is done by the appellee corporation, and the dissemination of that news, requires the expenditure of vast sums of money. It reaches out to the various parts of the United States, where its agents gather news which is wired to it, and through it such news is received by the various important newspapers of the country. Scarcely any newspaper could organize and conduct the means of gathering the information that is centered in an association of the character of the appellee because of the enormous expense, and no paper could be regarded as a newspaper of the day unless it had access to and published the reports from such an association as appellee. For news gathered from all parts of the country the various newspapers are almost solely dependent on such an association, and if they are prohibited from publishing it or its use is refused to them, their character as newspapers is destroyed and they would soon become

[1] 184 Ill. 438.

practically worthless publications. The Associated Press, from the time of its organization and establishment in business, sold its news reports to various newspapers who became members, and the publication of that news became of vast importance to the public, so that public interest is attached to the dissemination of that news. The manner in which that corporation has used its franchise has charged its business with a public interest. It has devoted its property to a public use, and has, in effect, granted to the public such an interest in its use that it must submit to be controlled by the public for the common good, to the extent of the interest it has thus created in the public in its private property."[1]

These estimates of the position of the Associated Press may with advantage be compared with the accounts one has of the operation of the Standard Oil Company. The interests consolidated under this management seem to have a control of the distribution of the products of petroleum which is substantially complete. Take the single point of the transportation of the oil. The crude oil is taken up by pipes at the wells, carried through a pipe line system to the refineries in different parts of the country. The product is sent from the refinery in special steamers or private cars, at local points it is put into large tanks, from these the carts are filled, from these the grocer's vats, from these the customer's can. In all these processes the oil is handled as a liquid, it is never put into a package. In all this there is little that is blameworthy; from an economic standpoint there is much that is praiseworthy. But it is plain that such conditions have produced a virtual monopoly in this business. The control that the Standard Oil Company has of its market is such that effective competition is no longer to be expected. By the principal tests, also, that have been discussed, this virtual monopoly appears. For a competitor to duplicate such a system of transportation as has been just described would involve such a cost that no investors would be found to take the risk. On the other hand, for one to undertake competition against the Standard Oil Company without laying such a network over the country, but relying upon the ordinary methods of transportation, would almost surely result in failure, since the cost of transportation of oil in packages, is, for practicable purposes, no alternative at all, because of the increased cost of transportation by such methods. It is recognition of

[1] Whether the associated news companies are in public calling is in dispute. See State *v.* Associated Press, 159 Mo. 410.

this, before rivalry is attempted, that more than anything else deters any competition.

Again, take the most recent instance, — the United States Steel Corporation. Under that management are concentrated all the industries that begin at the mines and end with the marketed product. It is its comprehension which makes it unlike any other corporation in its line of business. It is that in part that gives it control of its market. Add to this its commanding position due to its control of the ore lands upon the upper lakes, to its fleet of lake steamers, to its private railroads, and to its priorities in shipments. It owes its present monopoly to these things more even than to its aggregation of plants and its enormous capitalization.

But the case for virtual monopoly is not quite so plain in the case of the United States Steel Corporation as in the case of the Standard Oil Company. There is not so much to deter competition. Although a steel company must have a large capitalization, ten million dollars will do to construct a plant large enough to be efficient; and if the investors were assured of the protection of the law, the money could be found. But, after all, if the new ten million company began operations and sold in the general market, the restrictive conditions would still remain in substance; only two would share in the monopolistic position instead of one. This situation would result in much better conditions in the market; but it would not alter the fact that virtual monopoly rather than virtual competition prevailed in that business.

Whether the recognition of public calling as the result of virtual monopoly will come by legislation or adjudication it would be impossible to predict. It would be done with more speed by legislatures; it may be done with more care by the courts. In taking a proper attitude towards this question, the courts should say that they will accept any legislation that puts the industrial trusts under state regulation unless it seems to them that the legislation goes so far as to be outrageous, while they will put no business into the class of public calling unless they are convinced beyond reasonable doubt that it belongs there. The courts that take the conservative view upon this general problem of state regulation of the industries go no further than this, after all. Ladd *v.* Cotton Press Company [1] is one such case. There the company refused to treat its patrons alike.

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[1] 53 Tex. 172.

Mr. Chief Justice Moore held that so far as the actual law of Texas was concerned the company might do what it pleased: "The business of warehousing and compressing cotton is free to every one who wishes to engage in it. No grant or franchise need be obtained from the state to authorize those desiring to do so to embark in this character of business. It is not one of the employments which the common law declares public. Nor is it claimed to have been made so by statute. And we know of no authority, and none has been shown us, for saying that a business strictly *juris privati* will become *juris publici* merely by reason of its extent. If the magnitude of a particular business is such, and the persons affected by it so numerous, that the interest of society demands that the rules and principles applicable to public employments should be applied to it, this would have to be done by the legislature, if not restrained from doing so by the Constitution, before the demand for such an use could be enforced by the courts."[1]

In all of these businesses discussed in this section competition, although from a legal point of view possible, is from the economic point of view improbable. So far as one can see, virtual competition is at an end in many of the great industries, and virtual monopoly will henceforth prevail. Therefore it must be said that the public has now an interest in the conduct of these businesses by their owners; they are affected at the present time with a public interest, since these agencies are carried on in a manner to make them of public consequence. Therefore the corporations conducting these businesses, having devoted their property to a use in which the public has an interest, have in effect granted to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest they have created.

VII.

Our law has always held artificial monopoly to be an odious thing. Suppression of competition has always been dealt with as an evil by the common law. From the beginnings of our law, attempts by those in a given trade to obtain control of their markets have been held illegal. An early case that sums up the whole

[1] The following cases hold that in a doubtful situation legislative declaration is necessary: Dueber Co. *v.* Howard Co., 66 Fed. Rep. 645; American Co. *v.* Exchange, 143 Ill. 239; Delaware Railroad *v.* Stockyard, 46 N. J. Eq. 281; State *v.* Goodwill, 33 W. Va. 179.

matter is the case of the Button Makers,[1] the whole report of which follows. "Leave was granted to file an information against several plate-button makers for combining by covenants not to sell under a set rate. Holt, Chief Justice. It is fit that all confederacies by those of trade to raise their rates should be suppressed."

Whatever has tended to destroy competition and to further monopoly has thus appeared to our courts to be vicious. If such an arrangement put it in the power of one party to control the production of another in any way, that has been held quite sufficient for the utter condemnation of the contract as being against public policy. It has been enough if the tendency of the agreement will be to bring about monopolistic conditions if more of the same sort were entered into. And it does not relieve the situation if the baneful effects may be counteracted to a greater or lesser degree by competition of parties outside of the agreement. Upon the whole, few rules in our policy are so thoroughgoing.[2]

Central Ohio Salt Company *v.* Guthrie [3] is a representative case. By the arrangement in that case all the salt manufacturers, with one or two exceptions, in a large salt-producing territory combined for the expressed purpose of regulating the production and price of salt. A board of directors was chosen; and all salt made by the owners as soon as packed into barrels was placed under the control of the directors. By a by-law the manner and time of receiving and distributing salt was to be under the control of the directors, and the directors were to make monthly reports of sales, and pay over the proceeds to the members in proportion to the amount of salt received from each.

Upon these facts Mr. Chief Justice McIlvaine said in part: "Public policy unquestionably favors competition in trade to the end that its commodities may be afforded to the consumer as cheaply as possible, and is opposed to monopolies, which tend to advance market prices, to the injury of the general public. The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade, and for that reason, upon

[1] 12 Mod. 248.

[2] The following cases among others hold a contract in total restraint of trade bad: Toby *v.* Major, 43 Sol. Jour. 778; Oliver *v.* Gilmore, 52 Fed. Rep. 563; Tuscaloosa Ice Co. *v.* Williams, 127 Ala. 110; Lumber Co. *v.* Hays, 76 Cal. 387; Craft *v.* McConough, 79 Ill. 346; Chapin *v.* Brown Bros., 83 Ia. 156; Clark *v.* Needham, 125 Mich. 84; Fairbank *v.* Leary, 40 Wis. 637.

[3] 35 Oh. St. 666.

grounds of public policy, courts will not aid in its enforcement. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public. On the whole case we are clearly of the opinion that this agreement is void as against public policy." [1]

Such combinations to control the market have always been illegal in this way upon the ground that a combination had potentialities that no individual had to engross a product. But more than this, to form such combination which would control the market has been held an actionable conspiracy. It is upon this basis that the modern anti-trust statutes, which are to be found in so many jurisdictions to-day, have been rested. These laws demand competition through thick and thin; they regard monopoly as always unnatural, due wherever it is found to the machinations of evil-disposed conspirators against the commonwealth. In this view it is lost to sight that although in the usual trades competition has been under former conditions the natural state of things, at the present time in many businesses conditions which involve more or less of monopoly prevail.

The extent to which these anti-trust laws go may be seen in the leading case under the Sherman Anti-Trust Act, Addystone Pipe Company *v.* United States.[2] This arrangement was entered into by almost all of the manufacturers of iron pipe between the Alleghany Mountains and the Rocky Mountains. Before sales could be made by any member of the pool, he must obtain the right from the association. These rights were sold at a secret auction conducted by the central body, and the firm that bid the highest bonus got the right to make a tender to the customer whose business had been sold over the table in this manner. The others were bound to aid by furnishing fictitious competition by putting in higher bids; so that customers noticed no more than that prices went higher and higher. Matters at last reached such a

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[1] The following cases among others hold an agreement to control the market invalid: Hilton *v.* Eckersley, 6 E. & B. 47; Pacific Co. *v.* Alder, 98 Cal. 110; Moore *v.* Bennet, 140 Ill. 69; India Bagging Ass'n *v.* Kock, 14 La. Ann. 168; Cohen *v.* Envelope Co., 166 N. Y. 292; Morris Coal Co. *v.* Barclay Co., 68 Pa. St. 173; Mallory *v.* Oil Works, 86 Tenn. 59.

[2] 175 U. S. 211.

stage in that trade that the Department of Justice interfered, invoked the Sherman Anti-Trust Act, and obtained an injunction dissolving the combination.

In the course of the final decision Mr. Justice Peckham said: "The combination thus had a direct, immediate, and intended relation to, and effect upon, the subsequent contract to sell and deliver the pipe. It was to obtain that particular and specific result that the combination was formed, and but for the restriction the resulting high prices for pipe would not have obtained. We have no doubt that where the direct and immediate effect of a contract or combination among particular dealers in a commodity is to destroy competition between them and others, so that the parties to the contract may obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity, even though contracts to buy such commodity are continually being made. Total suppression of trade in the commodity is not necessary in order to render the combination one in restraint of trade."[1]

That the anti-trust statute has its uses is not to be denied; the present case shows the need of some such police regulation. But the modern legislator in drawing the modern statute of this sort makes no discrimination between times and places. To him monopoly is altogether bad, whether unnatural or natural, abnormal or normal. The result is that many of these anti-trust statutes even go so far as to make any concern that is a member of a combination in restraint of trade a commercial outlaw, unable even to collect its bills from its customers. But this uncompromising position of the law has had an effect of the greatest value. It has led all prudent people concerned in the promotion of great enterprises to abandon this loose form of association as too dangerous to be practicable. And this advance of the problem to this new stage is the first step in the solution of the trust problem.

The approved form to-day for making a consolidation of interests is by the formation of a single gigantic corporation intended to take over all the different concerns that are to be brought together. The courts have already dealt with the legality of this

[1] The following cases among others hold a combination in suppression of competition illegal: United States *v.* Joint Traffic Ass'n, 171 U. S. 605; State *v.* Insurance Co., 66 Ark. 466; State *v.* Gas Co., 153 Ind. 483; Anderson *v.* Jett, 89 Ky. 375; State *v.* Shlitz Co., 104 Tenn. 715; State *v.* Firemen's Club, 156 Mo. 1; Nester *v.* Brewing Co., 161 Pa. St. 473.

operation. In Trenton Potteries Company *v.* Oliphant[1] a conveyance had been made by the owners of a pottery business to the Trenton Potteries Company, which carried with it ancillary covenants by the sellers not to compete against the business sold. As the good will was included in the transfer, these covenants would be good, if the whole transaction were unobjectionable. The difficulty on this point was that the corporation grantee had been formed for the express purpose of taking over various competing plants, and that the object aimed at by the parties was to secure power to suppress competition and to control production.

Upon this point Mr. Chief Justice Magie took this marked advance in the law governing this problem: "Contracts by independent and unconnected manufacturers or traders looking to the control of the prices of their commodities, either by limitation of production, or by restriction on distribution, or by express agreement to maintain specified prices, are without doubt opposed to public policy. But appellant is a corporation and not an individual. Corporations, however, may lawfully do any acts within the corporate powers conferred on them by legislative grant. Under our liberal corporation laws, corporate authority may be acquired by aggregations of individuals, organized as prescribed to carry on almost every conceivable manufacture or trade: such corporations are empowered to purchase, hold, and use property appropriate to their business. Under such powers it is obvious that a corporation may purchase the plant and business of competing individuals and concerns. It follows that a corporation empowered to carry on a particular business may lawfully purchase the plant and business of competitors, although such purchases may diminish or, for a time at least, destroy competition. Contracts for such purchases cannot be refused enforcement."

Upon the faith of the assurance of counsel that the law is as this decision lays it down, billions of invested capital depend. There is no reason to suppose that this will not be accepted as law in most jurisdictions. Indeed, the law governing corporations has always regarded the corporation as an entity. One legal person, which is what the law holds the corporation to be, cannot be a combination in the eye of the law, — that would be a contradiction in terms. Moreover, apart from technicality, upon policy the corporation is altogether a different thing from the

[1] 58 N. J. Eq. 507.

association. In a corporation responsibility is concentrated and regulation is possible, because publicity is obtainable, and enforcement may be definite. Now that the law has driven the monopoly combination out from the cover of the blind into the open corporate form, it is possible to know what is best to be done, and it is possible, having decided that, to do it.[1]

The problem is therefore much simplified since the time of the trusts. It has been reduced to lowest terms by the praiseworthy activity of the law in insisting that all combinations of every stripe should be destroyed. Now that we have the fruits of that first victory in the enforced form of the large corporation, we may hold a council of war during this armistice. Shall these great corporations be destroyed, or shall they be regulated? That, it is submitted, is the trust problem in its latest phase. All of the law for the destruction of combinations in restraint of trade is to a certain extent superseded because the new monopoly is no longer in the form of a combination. On the other hand the law for the regulation of public employments can now for the first time be effectively applied to the whole field of virtual monopoly.

VIII.

Our law reports during the last decade have furnished us abundant evidence of the industrial wrongs that the trusts are perpetrating. Upon the whole, that upon which those who bear the brunt of these new conditions feel most strongly is the discriminations that these great corporations make in their dealings. These predatory raids which the robber trusts make into the field of peaceful competition raise the chief outcry against them. And this just complaint will not be stopped by pointing out that this sort of thing has been done all along by various dealers and has not been held unfair. This may be said to be the most important of the recent discoveries about the potentialities of the trusts: that a course of dealing which was fair enough in carrying on the former smaller businesses is essentially unfair in the conduct of the later larger businesses.

[1] It cannot be said that it is settled beyond dispute that the consolidation by incorporation is safe. The following cases imply that it is: United States *v.* E. C. Knight Co., 156 U. S. 1; Central Shade Co. *v.* Cushman, 143 Mass. 353; Meredith *v.* Zinc Co., 37 Atl 539 (N. J.); Oakdale Mfg. Co. *v.* Garst, 18 R. I. 484. On the other hand, the following cases imply that it is not: People *v.* Distilling Co., 156 Ill. 448; Richardson *v.* Buhl, 77 Mich. 632; National Co. *v.* Grote Store, 80 Md. App. 247; People *v.* Duke, 44 N. Y. Supp. 336.

The law against wrongs of this sort is still in the making. It has at least gone as far as the case of Jackson *v.* Stanfield.[1] Jackson was a broker engaged in buying and selling lumber. Stanfield was a member of a retail lumber dealers' association. The rules of this association provided that if any wholesale dealer should sell lumber direct instead of through retailers, all the members of the association of the retailers should upon notice refuse to have further dealings with such a wholesaler. In this particular case Jackson was the person injured by the enforcement of this rule by the association.

In holding this a conspiracy Dailey, J., said: "The great weight of authority supports the doctrine, that where the policy pursued against a trade or business is calculated to destroy or injure the business of the person so engaged either by threats or by intimidation, it becomes unlawful, and the person inflicting the wrong is amenable to the injured party in a civil suit for damages therefor. It is not a mere passive, let-alone policy, a withdrawal of all business relations, intercourse, and fellowship, that creates the liability, but the threats and intimidation involved in it."[2]

The case just discussed was against interference by a combination with the business of a rival. Whether a direct refusal by a combination to furnish goods to a dealer is illegal is the next question. Lowry *v.* Tile, Mantel, and Grate Association[3] decides even that to be against the Federal Anti-Trust Law. The amended complaint alleged: That, about the time of the formation of the association, plaintiffs had placed orders for tiles with the Columbia Encaustic Tile Company, which cancelled plaintiffs' orders because plaintiffs did not belong to the Tile, Mantel, and Grate Association; that, therefore, by reason of the monopoly of such association, plaintiffs are damaged in the sum of ten thousand dollars. Plaintiffs prayed for treble the sum of ten thousand dollars, in accordance with the provisions of the above-named act, and for further equitable relief. The ground of demurrer was that the amended complaint did not state facts sufficient to constitute a cause of action.

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[1] 137 Ind. 592.

[2] The following cases are against interference by combinations: Davenant *v.* Hurdis, Moore 576; Boots Co. *v.* Grundy, 82 L. T. 769; S. *v.* Glidden, 55 Conn. 46; S. *v.* Donelson, 32 N. J. Law, 151; McCauley *v.* Tierney, 19 R. I. 255; Barr *v.* Trades Council, 53 N. J. Eq. 101; Olive *v.* Van Dalten, 7 Tex. Civ. App. 630; Bailey *v.* Plumbers' Ass'n, 103 Tenn. 99.

[3] 98 Fed. Rep. 817.

Morrow, the district judge, said in part: "The allegations charging conspiracy and combination to raise the price of the commodities in question, and of an agreement by the members of such combination to sell these commodities at such prices as shall be arbitrarily fixed by the combination in question, together with the further allegation that such combination has been made with the intent of monopolizing trade and commerce between California and other states, are sufficient, under these authorities, to bring the case within the operation of the provisions of the Sherman Act. Defendants' demurrer upon the ground of the insufficiency of the facts stated to constitute a cause of action cannot, therefore, be sustained." [1]

In view of these authorities it may be predicted that courts are going to do something to protect the ordinary man in business from such competition by such combinations. The wish to do this in every case is seen in People *v.* Duke; [2] but the circumstances alleged in that case were peculiarly outrageous. This indictment charged the defendants with the crime of conspiracy. It alleged that, at the time specified, they were officers and agents of a corporation called the American Tobacco Company; that they controlled, managed, and operated the said corporation; that the greater portion of the cigarettes manufactured and vended in the United States were made and vended by them; that they (the defendants) and others conspired unlawfully to commit an act injurious to trade and commerce, — that is to say, to monopolize the entire business of making and vending cigarettes throughout the United States, and to exclude every other person from engaging in such business; to limit, fix, and control the production, manufacture, and output of cigarettes, by conspiring to compel and force such dealers and jobbers to sell at arbitrarily fixed prices; to coerce, force, and compel such dealers and jobbers to deal exclusively in the cigarettes of the American Tobacco Company, by refusing to sell to all who dealt in cigarettes of any other manufacturer. Two overt acts, in furtherance of this agreement, were then specifically set forth.

[1] The following cases, among many, hold conspiracies to injure another in business actionable: R. *v.* Bykerdike, 1 M. & Rob. 179; R. *v.* Parnell, 14 Cox, C. C. 508; Hornby *v.* Close, L. R. 2 Q. B. 153; Orr *v.* Ins. Co., 12 La. Ann. 255; Plant *v.* Woods, 176 Mass. 492; Lucke *v.* Assembly, 77 Md. 396; Weston *v.* Barnicott, 175 Mass. 454; Mapstick *v.* Ramage, 9 Neb. 390; Ertz *v.* Produce Exchange, 79 Minn. 140; State *v.* Dyer, 67 Vt. 695; Gatson *v.* Buerning, 106 Wis. 1.

[2] 44 N. Y. Supp. 336.

Mr. Justice Fitzgerald disposed of the argument for the defendants in this manner: "It is further claimed that, because defendants are directors and agents of a private corporation, they had a perfect right to do all of the acts alleged against them. A very wide latitude must, indeed, be accorded to the managers of a vast private enterprise, lawfully organized, and it is exceedingly difficult to fix the bounds beyond which they may not lawfully go. They are certainly entitled to reap all the advantages which skill, experience, large investment, enterprise, and splendid facilities afford them over less favorably equipped competitors; and if, by such means, vast trade is attracted, to the detriment of mere business rivals, it would be difficult to see how injury to the public could arise. The principle established by the adjudged cases appears to be that, where actual or possible public injury does not arise from the business methods of individuals or corporations, the natural law of supply and demand may be depended upon to protect the public welfare. A trading corporation is entitled to all the advantages it can secure under fair and free competition, but its officers and agents may become criminally liable if they confederate to secure a monopoly by threats and menaces directed against competitors, to force and coerce them to relinquish the rights to the fullest enjoyment of which all are entitled. If, then, the proof in the case at bar should establish the allegations of the indictment, might not the refusal to sell to jobbers and dealers except upon the required conditions be properly found to constitute menace, coercion, and intimidation? And if such methods or devices were resorted to by defendants to restrain lawful trade and commerce, and create a monopoly, are they not guilty of conspiracy? Demurrer disallowed, with leave to defendants to plead over."

On the other hand in a somewhat similar case — United States *v.* Greenhut[1] — the court decided the other way. This indictment set forth that the defendants were officers of the Distilling and Cattle Feeding Company; that, as such officers, they purchased or leased seventy-eight theretofore competing distilleries in the United States, and, within certain states specified, used, managed, controlled, and operated the said distilleries, manufacturing sixty-six million gallons of distilled spirits, the whole being seventy-five per cent of all the spirits sold in the United States; that all the acts com-

[1] 50 Fed. Rep. 469.

plained of were done with intent to monopolize the business and to prevent free competition in the sale, in pursuance of which the defendants agreed with various dealers that if such dealers would buy all their supplies from the defendants for six months, the company would give them a rebate of two cents per gallon on their purchases, whereby in the end they had increased the usual prices at which spirits were sold in Massachusetts.

Mr. Justice Nelson quashed the indictment upon the ground that no conspiracy but simply incorporation was found: "This indictment does not allege that the defendants entered into any unlawful combination or conspiracy. Nor does it contain any argument that they had monopolized trade or commerce among the several states or foreign nations. It is true that the indictment charges that the defendants have done certain things with intent to monopolize the traffic in distilled spirits among the several states, and that they have increased the usual prices at which distilled spirits were sold in Massachusetts; and have prevented and counteracted the effect of free competition in such traffic in Massachusetts. But none of these things are singly made offences by the statute."

There is nothing to show that the allegations made in these two cases are true in respect to these two particular corporations. But if it be true that this sort of thing is practised when necessary as part of the business policy of the modern trust, the situation is serious indeed. The trust, it is thus alleged, refuses to sell at all to small dealers who buy goods of any description from competing concerns. Smaller manufacturers as a consequence would find it almost impossible against such competition to dispose of their goods, however meritorious, because the trust might have a few brands well known to the public which the small dealer must have in stock. It is the danger of competition of this sort which makes the trust problem so acute.

These opposite opinions upon the legality of these practices are what one would expect to find, for this is the borderland between two fields of the law. The law of private calling, on the one hand, permits any refusal to deal for any purpose by any individual in trade, justifies therefore any discrimination between any customers for any policy. The present experience of the public with the management of some of the modern industrial corporations it would seem ought to have taught the lesson that this law has been outgrown. The contention is that the time has

come to put these great businesses under the law of public calling; for that law requires that all who apply shall be served without discrimination, for reasonable compensation with proper facilities. The enforcement of this law would put an end to the worst abuses by the present trusts.

IX.

Without doubt public opinion to-day demands publicity as to the doings of these great corporations, — not formal and general statements, but detailed and specific reports to be made to public bodies with full powers in the matter. But publicity, it is obvious, is only the means to an end; the end is effective regulation upon the basis of this information. To meet the exigencies of the present situation, positive law is required. This seems to be an accurate statement of the present status of the trust problem. What are the industrial rights and wrongs in the present operations of these industrial trusts? How may these be protected and prohibited as legal rights and wrongs?

It has been pointed out that the power of the trusts to crush efficient competitors is dependent to a large extent upon various kinds of personal discrimination. It will be profitable to see how the courts have dealt with this sort of thing in the case of the recognized public callings, since the establishment of any business as public in its nature depends in the last analysis upon the existence of virtual monopoly. The rule requiring service to all who apply without discrimination against any, is founded upon the absolute necessity, as a social question, of preventing those who have control of the market from exercising that power to the disruption of the industrial order.

The promptness with which the courts act to prevent personal discrimination in the case of an admitted public employment is shown in a decision like Menacho *v.* Ward.[1] It was alleged by the complainant in that case that the defendants had announced generally to New York merchants engaged in the Cuban trade that they must not patronize steamships which offered for a single voyage. The complainants, notwithstanding this warning, had shipped by a tramp steamer. They were thereupon notified that they had been placed on the black list; as a consequence of which act the defendants had been charged greater rates of freight than those

[1] 27 Fed. Rep. 529.

merchants had been charged who shipped exclusively by the defendants.

Mr. Justice Wallace said: "The defendants assume to discriminate against the complainants, not because they do not furnish them a regular business, or a given number of shipments, or a certain quantity of merchandise, to carry, but because they refuse to patronize the defendants exclusively. The vice of the discrimination here is that it is calculated to coerce all those who have occasion to employ common carriers between New York and Cuba from employing such agencies as may offer. Its tendency is to deprive the public of their legitimate opportunities to obtain carriage upon the best terms they can. If it is tolerated it will result practically in giving the defendants a monopoly of the carrying trade between these places. Manifestly it is enforced by the defendants in order to discourage all others from attempting to serve the public as carriers between those places. Such discrimination is not only unreasonable, but is odious."

In public businesses the law is thus flatly opposed to such discrimination in the open; it is equally opposed to such discrimination under cover. One in public employment is not allowed to justify such acts on the ground of business policy when they are contrary to the public interest. Arrangements cannot be enforced to strengthen one's own position when that involves a violation of public duty. An extreme case in point is Chesapeake Telephone Company *v.* Baltimore Telegraph Company. The telephone company was operating under a license which bound it to give its service for delivery of messages to the Western Union Telegraph Company, but to refuse all competitors of the Western Union.

Mr. Chief Justice Story said: "The appellant is in the exercise of a public employment, and has assumed the duty of serving the public which is in that employment. In this case the appellant is an incorporated body, but it makes no difference whether the party owning and operating a telegraph line or a telephone exchange be a corporation or an individual, the duty imposed, in respect to the public, is the same. It is the nature of the service undertaken to be performed that creates the duty to the public, and in which the public have an interest, and not simply the body that may be invested with power. The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial and business public. They are public vehicles of intelligence, and they who own or

control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable and proper rules and regulations for the government of their offices and those who deal with them, but they have no power to discriminate, and while offering to serve some, refuse to serve others. The law requires them to be impartial, and to serve all alike, upon compliance with their reasonable rules and regulations."

The necessity of compelling those in public employment to serve without discrimination is thus apparent; it is no less obvious in every case of virtual monopoly. It seems to be an almost conclusive argument for treating as public-service companies all great corporations that have established control of their market, that by no other law than that of public calling can the situation be met. In private calling factor's agreements of this sort are supported, which shows that the present conditions in the conduct of these great businesses have outgrown this law. In public callings every such restrictive condition is void which points to this law as the way out. All of which has this further application: in private business this sort of competition is properly held fair; in public business it is properly held unfair. That it is the modern desire to protect the small manufacturers from such competition by the large manufacturers there can be no doubt to any one informed of present public opinion upon these questions.

The law of public calling is thus a solution for the most desperate need in the present situation; it is also the way out for the only other necessity of the situation that is of first importance. In private business one may demand any price one may get; not so in public business, there only a reasonable price can be exacted. That there is danger of unreasonable prices in the present, is quite evident. Control of the market leads to power to put up price, power which unfortunately leads to action. No law can effectively deal with monopoly without the right to restrict to reasonable prices. The law governing the public services has that right.[1]

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[1] The following cases among others discuss the well-established rule against discrimination in public employment: Western Telegraph Co. *v.* Call Publishing Co., 181 U. S. 92; Hays *v.* Penn. Co., 12 Fed. Rep. 309; Mobile *v.* Brenville Water Co., 30 So. Rep. 445; Messenger *v.* Penn. R. R., 37 N. Y. L. 531; Root *v.* Long Is. R. R., 114 N. Y. 300; Griffin *v.* Goldsboro Water Co., 112 N. C. 206; State *v.* Cincinnati R. R., 47 Oh. St. 130; Bailey *v.* Fayette Gas Co., 193 Pa. St. 175.

With this difficult problem of the determination of the reasonable rate, the law of public calling is dealing with some success. The scientific nature of the subject is now beginning to be apprehended. Elaborate rules are being framed; for at last the rights of both sides are appreciated. On the one hand the full right of the public to restrict a public service company to reasonable charges is recognized; on the other hand the corresponding right of the public service company to a fair return upon its capital is admitted. The case of Brymer *v.* Butler Water Company [1] shows how a late decision deals with this troublesome conflict of interests. A schedule of rates fixed by a water company came up for examination under a statute which gave the court powers to revise.

The method of the court in dealing with this schedule is shown in the opinion of Mr. Justice Williams: "The court is authorized to say: This charge is oppressive, you must decrease it. You are entitled to a charge that will yield a fair compensation to you, but you must not be extortionate. This leads us to the second question raised, viz.: by what rule is the court to determine what is reasonable and what is oppressive? Ordinarily that is a reasonable charge or system of charges which yields a fair return upon the investment. Fixed charges and the costs of maintenance and operation must first be provided for, then the interests of the owners of the property are to be considered. They are entitled to a rate of return, if their property will earn it, not less than the legal rate of interest; and a system of charges that yields no more income than is fairly required to maintain the plant, pay fixed charges and operating expenses, provide a suitable sinking fund for the payment of debts, and pay a fair profit to the owners of the property, cannot be said to be unreasonable."

A company that is engaged in a public business is therefore entitled to a fair return upon its investment. This is true of a gas plant and water works; this would be true of the oil company and the steel corporation if the law of public callings were enforced against them. The law of public callings does not demand confiscation by any means; it only involves limitation at the most. But what is the true investment, and what is a fair return upon it? The law of public employment cannot deal effectively with this dangerous phase of the trust problem unless it is clear upon these points. It is common knowledge that in most cases the capital-

[1] 179 Pa. St. 231.

ization of industrial trusts is double the actual amount ever invested in the enterprises consolidated. This sort of thing would not confuse the Supreme Court of the United States in the determination of the propriety of rates. Smyth *v.* Ames[1] makes that point clear.

In that important case Mr. Justice Harlan said in part: "If a railroad corporation has bonded its property for an amount that exceeds its fair value, or if its capitalization is largely fictitious, it may not impose upon the public the burden of such increased rates as may be required for the purpose of realizing profits upon such excessive valuation or fictitious capitalization; and the apparent value of the property and franchises used by the corporation, as represented by its stocks, bonds, and obligations, is not alone to be considered when determining the rates that may be reasonably charged. We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under the particular rate prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

Working out of the reasonable price according to the law of public employment as shown in these opinions will defeat even the most insidious attempts by the industrial corporations to exact from the general public while they have virtual control of the market more than a fair return for services rendered. The plea is often made that these great corporations are in truth capitalized at no more than their future earning capacity. Granted that this is the near truth, it is no argument against the right of the

[1] 169 U. S. 466.

public in the matter. Indeed, if the validity of this argument in behalf of a company that had virtual monopoly was once admitted, it would destroy all possibility of regulation, since the tighter the monopoly the higher the price, the higher the price the greater the earning capacity, the greater the earning capacity the larger the capitalization, the larger the capitalization the higher the price, — that would be the working out of it.[1]

Plainly there is no safe basis for the determination of the rate except the actual investment. It may be urged that the result of this rule will be to give to the public the advantage of operation under monopolistic conditions, in particular the elimination of the wastes of competition. The reply is that this is precisely the method that should be pursued in dealing with the trust problem. If the state permits monopoly it may demand in return that the monopolist serve at a reasonable price. This has always been the law of public callings when the statement of it is made with discrimination. No rate per ton, no price per cubic foot is reasonable in itself; it depends for its propriety upon whether by such charges the railroad company or the gas company in question will earn too much. In the same way the contention of the promoters of the trusts should be met by our law. It is not an answer for the Standard Oil Company to point to the fact that upon the whole it has not advanced the price of kerosene above the price at which it would have been fixed from time to time had competitive conditions prevailed during the whole period. It is still open to the general public to point to the forty-eight per cent dividends in the last years, to say that these are the proofs of the contention that, notwithstanding, the price of kerosene has been too high during the whole period.

X.

It is not pretended that what has been suggested in this article should be taken as established. It is put forth merely as a working hypothesis that a solution of the trust problem may be found in the law governing the public callings. That the opera-

[1] The following cases among others discuss the established rule restricting public-service companies to reasonable prices: Canada Southern Co. *v.* International Bridge, 8 App. Cas. 723; Reagan *v.* Trust Co., 154 U. S. 362; Land Co. *v.* City, 174 U. S. 739; So. Pacific Co. *v.* Commissioners, 78 Fed. Rep. 236; Milwaukee Railway *v.* Milwaukee, 87 Fed. Rep. 577; Gloucester Water Co. *v.* Gloucester, 179 Mass. 365; Stevenson *v.* Great Northern Ry., 69 Minn. 353.

tions of these trusts have become of such public consequence as to affect them with a public interest is submitted for approval. That at least the greatest of these trusts have, in their control of their respective markets, so far an assured permanence from the conditions prevailing in their respective businesses, is stated subject to correction. If these things are as asserted, it is urged that these particular industrial corporations should be held public-service companies. It is not to be wished upon social grounds that the results of this industrial evolution should be swept away by prohibitions against these new conditions. It is rather to be desired upon economic grounds that these effective producers in their special fields should be turned to the common advantage. The effectual regulation which may secure this general good, it is submitted, is to be found in the body of the law governing public employment, which requires, with elaborate detail for the enforcement of the general principles, that those who conduct a business in which the public has an interest serve all who apply without discrimination, for reasonable compensation, with adequate facilities. The enforcement of that law ought to accommodate all of the conflicting interests involved in this great issue. If this law of public employment could be enforced against the industrial trusts, it may be hoped, a solution would be found for the trust problem.

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